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IN THE

Supreme Court of the United States

October Term, 1963

No. 1005

VERNON EVANS BERGMAN AND
HENRY MADISON MYRICK, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 18, 1963.

CITATION TO OPINION BELOW

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals has not yet been reported and is printed in Appendix B hereto, infra, p. 17. Rehearing was denied by the Court of Appeals without rendering an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 18, 1963 (Appendix B, p. 16). Rehearing was denied on February 19, 1964. (Appendix B, p. 24). Mr. Justice Black, Supreme Court of the United States, on March 9, 1964, signed an order granting an extension of time within which to petition for certiorari extending Petitioners' time to and including April 19, 1964 (Appendix B, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether verifax copies of microfilmed bank records, such verifax copies having been prepared specifically for the purpose of a criminal prosecution and not made in the regular course of business, are admissible in evidence under Title 28 U.S.C., Sec. 1732 over defendant's objections that no proper predicate had been laid under the best evidence rule.

Statute Involved:

Title 28 U.S.C. Sec. 1732 (Appendix A, p. 12)

2. Whether the trial court's instructions to the jury on Count IV of the indictment in which the "essential elements" of the offense were carefully listed, enumerated, and recapitulated for the jury, but which instructions continued to omit an indispensible element of the offense and failed to require a finding by the jury of this indispensible element of the offense constitutes *reversible error*?

Statute Involved:

Title 18 U.S.C., Sec. 2314 (Appendix A, p. 14).

3. Whether Count IV of the indictment which alleges the transportation in interstate commerce of a stolen bank draft in the *amount* of $7,000.00 is fundamentally defective in failing to allege that the draft was of the *value* of $5,000.00 or more in violation of Title 18 U.S.C., Sec. 2314.

Statute Involved:

Title 18 U.S.C., Sec. 2314 (Appendix A, p. 14)

STATEMENT

The petitioners, Vernon Evans Bergman and Henry Madison Myrick, were tried under a joint four count indictment in the United States District Court for the Eastern District of Texas, Tyler Division, Count I of the indictment was based on 15 U.S.C., Sec. 77q(a) and charged with a scheme to defraud various persons and the offer and sale of capital stock in a life insurance company and capital stock of another corporation, Count II of the indictment was based upon 18 U.S.C., Sec. 1341 and charged the use of the mails to defraud based upon the same factual allegations contained in Count I. Count IV of the indictment was based on 18 U.S.C., Sec. 2314 and charged the transportation in interstate commerce of a certain bank draft *in the amount* of Seven Thousand Dollars.

At the close of the Government's case the trial court granted a motion for acquittal of both petitioner Berg-

man and Myrick as to Count III (Tr. 817) and of petitioner, Myrick as to Count IV. (Tr. 842)

The jury found each petitioner guilty of Counts I and II and found petitioner, Bergman guilty also as to Count IV. The petitioners received sentences as follows:

Petitioner	*Count*	*Term*
Bergman	I	Five years
	II	Five years on Count I, to run concurrent to sentence on Count I
	IV	Five years to run consecutive to sentences on Counts I and II but suspended for five years with active probation to begin at expiration of prison terms.
Myrick	I	One year and one day
	II	Five years consecutive to sentence on Count I, suspended for five years with active probation to begin at expiration of prison term.

During the course of the trial the Government introduced into evidence verifax copies of certain microfilmed bank records which constituted material evidence in support of Counts I, II, and IV of the indictment.

The evidence was undisputed that these verifax copies had not been made in the regular course of business, but were prepared specifically for the purpose of this criminal prosecution. The microfilms from which the verifax copies were allegedly made had been made in the regular course

of business, but such original microfilms were not introduced. The record affirmatively shows that the original microfilms of Government Exhibits Nos. 96, 97, 98, 99 and 100 were not in the Courtroom available for inspection, but were in the State of Louisiana (Tr. 266-267), and there is no showing in the record that the original microfilms of Government Exhibits Nos. 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91 were in the Courtroom. No reason was given by the Government for not producing the original microfilm for inspection by counsel for the defense.

Counsel for the defense objected to the admission of each of the verifax copies on the ground that under the best evidence rule that there had been no predicate laid.

The trial court overruled the objection on the ground that the verifax copies of the microfilm were admissible in evidence under 28 U.S.C. Sec. 1732 and said "The photostatic copy of it is just as admissible as the original." (Tr. P. 182)

In the Court of Appeals Petitioners urged that *Toho Busson Kaisha, Ltd. v. American President Lines, Ltd.* 265 F.2d 418 (C.A. 2, 1959) (Appendix C, p. 26) had correctly interpreted 28 U.S.C., Sec. 1732 in holding that although original books of account kept in the regular course of business themselves would be admissible but that photostats prepared specifically for litigation are not within the Statute, because there are dangers of fraud and imposition in the use of such photostats prepared specifically for trial and not made in the regular course of business.

The court of Appeals affirmed the District Court's ruling that such verifax copies were admissible under 28 U.S.C., Sec. 1732b. (Appendix B, p. 22)